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No. 00-1636

IN THE

Supreme Court of the United States

MICHAEL TEN EYCK, individually, THOMAS LINDERT, individually, CARMINE RESTIVO, JR., individually, and ROBERT THOUBBORON, individually,

Petitioners,

v.

JOHN LEATHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion Of *Amici Curiae* The New York State Sheriffs' Association Institute, Inc.; The National Sheriffs' Association; The Louisiana Sheriffs' Association; The Virginia Sheriffs' Association; The Illinois Sheriffs' Association; The Florida Sheriffs' Association; The Buckeye State Sheriffs' Association; The Alabama Sheriffs' Association; The Georgia Sheriffs' Association; The New Mexico Sheriffs-Police Association, The Maryland Sheriffs' Association; The Nebraska Sheriffs' Association; The Indiana Sheriffs' Association; The Idaho Sheriffs' Association; The California Sheriffs' Association; And The Oklahoma Sheriffs' Association, For Leave To File Brief *Amici Curiae* In Support Of Petitioners And Brief *Amici Curiae*

PETER R. KEHOE
Counsel of Record
THOMAS MITCHELL
MCGOVERN, KEHOE AND MITCHELL
Attorneys for Amici Curiae
27 Elk Street
Albany, New York 12207
(518) 432-4318

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The New York State Sheriffs' Association Institute, Inc., The National Sheriffs' Association, the Louisiana Sheriffs's Association, the Virginia Sheriffs' Association, the Illinois Sheriffs' Association, the Florida Sheriffs' Association' the Buckeye State Sheriffs' Association, the Alabama Sheriffs' Association, the Georgia Sheriffs' Association, the New Mexico Sheriffs-Police Association, the Maryland Sheriffs' Association, The Nebraska Sheriffs' Association, The Indiana Sheriffs' Association, The Idaho Sheriffs' Association, The California Sheriffs' Association, and The Oklahoma Sheriffs' Association, hereby move, pursuant to Supreme Court Rule 37.2, for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. *Amici* are filing this motion because Respondent John Leather has declined to consent to refiling of this *amicus curiae* brief. A copy of the proposed brief is attached.

As more fully explained in the attached brief under "Interest of *Amici Curiae*", amici are national, and statewide law enforcement organizations, and the members of all of these organizations are directly affected by the applicability of the decision of this Court in *Heck v. Humphrey* (512 U.S. 477 (1994). Thousands of individual police and peace officers are members of the *amici* who seek to file a brief in this case. They, of course, are subject to potential Section 1983 liability for many actions, since they daily exercise the police powers of their respective jurisdictions. The decision in the case at bar significantly expands the liability of the police and peace officers, by essentially overturing the decision of this Court in *Heck*, which in turn was based on long-standing principles generally found not only in federal law, but individual state laws as well.

The brief will assist the Court in determining whether to grant certiorari because *amici* are well positioned to point out how this case affects law enforcement officers around the entire United States; the explicit challenge to the integrity of this Court's decision in *Heck v. Humphrey* as a result of second-guessing and interpretation of concurring and dissenting opinions to declare what a "new majority" of Justices of this Court would decide with respect to the central issue determined by *Heck*; and the need for this Court to grant certiorari to protect police and peace officers, as well as all other public servants, from a new and unfair source of liability.

It is respectfully requested that the Court grant leave to file the attached brief of the *amici* in this case.

Respectfully submitted,

PETER R. KEHOE
Counsel of Record
THOMAS MITCHELL
MCGOVERN, KEHOE AND MITCHELL
Attorneys for Amici Curiae
27 Elk Street
Albany, New York 12207
(518) 432-4318

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CONSENT OF THE PARTIES

Petitioners have consented to the filing of this brief, *amici curiae*.[1]

INTEREST OF AMICI

This brief, *amici curiae*, is respectfully submitted on behalf of the following organizations: the New York State Sheriffs' Association Institute, Inc.; the National Sheriffs' Association; the Louisiana Sheriffs's Association; the Virginia Sheriffs' Association; the Illinois Sheriffs' Association; the Florida Sheriffs' Association; the Buckeye State Sheriffs' Association; the Alabama Sheriffs' Association; the Georgia Sheriffs' Association; the New Mexico Sheriffs-Police Association; the Maryland Sheriffs' Association; the Nebraska Sheriffs' Association; the Indiana Sheriffs' Association, The Idaho Sheriffs' Association; The California Sheriffs' Association, and the Oklahoma Sheriffs' Association.

The New York State Sheriffs' Association Institute, Inc. (NYSSAI) is comprised of each of the 58 Sheriffs in the State of New York. Its purpose is to strengthen and enhance the office of Sheriff, and to work with local, state and national organizations similarly interested in providing effective law enforcement services. NYSSAI is the collective voice for its members before state and national governmental agencies and private organizations that either oversee or otherwise influence the delivery of police, corrections court security and civil law enforcement services and functions that Sheriffs are entrusted by law to perform.

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1. The consent of the petitioners has been filed with the clerk of this Court. The Respondent, John Leather, has declined to consent to the filing of this *amici curiae* brief. This brief was authored by the amici and counsel listed on the front cover hereof, and was not authored, in whole or in part, by counsel for a party. No one other than the amici and their counsel made any monetary contribution to the preparation or submission of this brief.

Similarly, each of the other *amici* perform the same duties and responsibilities in their respective states.

Every member of all of these organizations seeking *amici* status are directly affected by the applicability of the decision of this Court in *Heck v. Humphrey* (512 U.S. 477 (1994). The overturning of this Court's decision in *Heck*, which in effect has been accomplished by the Second Circuit in this case, creates a new and unfair source a liability for police and peace officers in particular, and for public servants in general. The Second Circuit in this case, contrary to the express holding of *Heck*, sanctions re-litigation and re-examination of issues resolved against a convicted defendant in a state criminal trial, by means of a federal Section 1983 lawsuit. This decision has thus created a new liability for police and peace officers where none existed before, either under federal law or under state laws designed similarly to provide a forum for claims of unlawful arrest or prosecution.

STATEMENT OF THE CASE

In early December, 1994, John Leather was arrested by deputies of the Putnam County Sheriff's Office for driving while intoxicated, a crime (misdemeanor) in the State of New York. After a non-jury trial, Mr. Leather was convicted of the offense of driving while his ability to operate a motor vehicle was by impaired by alcohol, a violation under New York law. Although punishable by imprisonment, Mr. Leather, like most first time offenders for this type of offense, was sentenced to paying a fine and a surcharge, and also suffered a temporary suspension of his driving privileges. Mr. Leather was entitled to appeal his conviction to the Putnam County Court, but either failed or declined to do so. Mr. Leather's driving privileges were eventually restored, and he paid the required fine and surcharge.

In 1997, Mr. Leather sued the Putnam County Sheriff, several deputies, and the County of Putnam, claiming that he was "targeted" by the Sheriff's Office for the driving while intoxicated arrest because of a prior political disagreement with the Sheriff as to what agency should be responsible for the operation of the county's 9-1-1 call center. A Section 1983 lawsuit was commenced for compensatory and punitive damages.

This Court had recently ruled, in 1994 (*Heck v. Humphrey*, 512 U.S. 477) that lawsuits in such cases are not allowed, and that to recover in a Section 1983 suit, the plaintiff must show that his conviction has been declared invalid or at least called into question by a federal court's issuance of a writ of habeas corpus. In the case at bar, the only thing that the plaintiff, Leather, did to challenge his conviction was to commence the Section 1983 lawsuit. Based on these facts, the trial court below dismissed the action in accordance with the clear ruling by this Court in *Heck*.

The Second Circuit reversed that dismissal order and allowed the case to proceed to trial. The Second Circuit made a distinction between claimants who are in custody, and those who are not in custody. The Second Circuit agreed that the *Heck* rule should apply to Section 1983 claimants who are in custody, since they can challenge their conviction by seeking the issuance of a writ of habeas corpus. However, the Second Circuit ruled that for those who are not in custody, there is no availability (or, of course, need) for habeas corpus relief; as to those claimants, *Heck*, the court declared, would not bar a Section 1983 action for damages.

Mr. Leather's case then proceeded to trial, where a jury found for the plaintiff and awarded compensatory and punitive

damages. The trial court, in a decision on a post-trial motion, reduced the damages awards considerably, most notably reducing punitive damages against Sheriff Robert Thoubboron from $435,000 to $3,000. All defendants in the Section 1983 action appealed to the Second Circuit Court of Appeals, citing several grounds for appeal. With respect to the *Heck* argument, the Second Circuit refused to reconsider its earlier ruling that *Heck* should not apply to bar Leather's Section 1983 lawsuit in this case.

All the original defendants in the action, except for the County of Putnam, now seek a writ of certiorari and have raised the issue of the continued application of the *Heck* rule. This *amici curiae* brief, if accepted by the Court, is filed in support of the petitioners and on behalf of the New York State Sheriffs' Association Institute, Inc., as well as thirteen other statewide and national law enforcement organizations from all over the United States.

REASONS FOR GRANTING THE WRIT

In *Heck v. Humphrey*, this Court issued a clear and simple rule applicable to the commencement of Section 1983 actions where the claimant was a defendant in a state court criminal trial. In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, *Heck* requires that a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. This Court explained that in announcing the rule, it did not add an exhaustion

requirement upon § 1983 actions, as is generally required for federal habeas corpus proceedings; rather, this Court simply said that there should be no Section 1983 cause of action where the state court conviction is not overturned or at least "called into question".

This "favorable termination" requirement was extended by the Supreme Court to prisoner allegations of due process violations in prison discipline hearings resulting in deprivation of good-time credits in *Edwards v. Balisok*, 520 U.S. 641, 648, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997).

The rationale for the *Heck* rule has been called into question by some federal courts when the section 1983 plaintiff does not have a habeas corpus remedy to challenge the determination or action for which he alleges a federal cause of action. However, *Heck v. Humphrey* is not based solely on the need to preserve habeas corpus as a federal remedy. Heck should apply as much to those who are no longer incarcerated, as to prisoners in custody (where habeas is an available remedy). In *Heck*, this court did not simply say that its decision was based on the availability of habeas corpus as an appropriate remedy for state offenders to attack the validity of the fact or length of their confinement. Rather, the court comprehensively examined the common law of tort liability and concluded that proof of the illegality of a conviction is a *necessary element* of the Section 1983 cause of action. Unless that conviction has been reversed, there has been no injury of constitutional proportions, and thus no Section 1983 suit may exist. Moreover, *Heck* made it clear that a Section 1983 action may still lie where a successful civil damage recovery would not necessarily imply the invalidity of the plaintiff's state court conviction. Where, however, as in the instant case, a recovery in a federal Section

1983 action would necessarily imply that the conviction was wrong, it is not unreasonable to require a showing that the conviction was overturned (or otherwise called into question as allowed by *Heck*).

Spencer v. Kemna, 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 423 (1998) has been cited by some federal courts which have questioned the continued validity of the *Heck* rule when the Section 1983 claimant is not in custody, and therefore cannot invoke federal habeas jurisdiction. However, cases, including the one at bar, relying on *Spencer* to eliminate *Heck's* insistence on an overturning (or at least a questioning) of the state court conviction rest on a suggestion by this Court *in dictum* about the availability of a Section 1983 action. These cases also rely on piecing together concurring and dissenting opinions of the Justices in the *Spencer* decision to define, in effect, a new *Heck* rule which was not set forth by this Court in *Spencer*, and has not been adopted by this Court in any other case. As stated in the Petition for a Writ of Certiorari in the case at bar, this approach ignores the right of the Supreme Court to declare for itself whether a decision made by it, just seven years ago, should be overturned or severely restricted (*see also Whisenhunt v. Cornyn*, N.D. Tex. 2001, 2001 WL 434594; *Rodriguez v. Penobscot County Jail*, 2001 WL 376453, D. Me., 2001; *Wright v. Smith*, 2001 WL 194060, N.D. Tex. 2001; and *Clay v. Allen*, 242 F.3d 679 (5th Cir. 2001)).

Further, as has been noted in *Warner v. Orange County Dept. of Probation,* 115 F.3d 1068 (2d Cir. 1997), the *Heck* rule bars a state offender from suing under Section 1983 when his conviction remains outstanding and cannot be reconciled with his claim under Section 1983. The rule applies most

clearly where the defendant has been convicted of a crime, but contends in his Section 1983 action that he was prosecuted for an unconstitutional reason. Such a defendant's outstanding conviction demonstrates that he was prosecuted with good reason, and that is precisely the rationale for the *Heck* ruling.

The core holding of Heck is that annulment of the underlying conviction is an element of a Section 1983 "unconstitutional conviction" claim, regardless of the applicability of federal habeas remedy. "Creating an equitable exception to this tenet not only would fly in the teeth of *Heck*, but also would contravene the settled rule that a section 1983 claimant bears the burden of proving all the essential elements of her cause of action", noted by *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir., 1998). In deciding *Heck*, this Court relied on the time-honored principal that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments (*Heck*, 512 U.S. at 486). This is entirely consistent with New York State law, with respect to civil actions that may be brought in state courts to address alleged wrongful prosecutions or arrests. New York cases have long and consistently held, for example, that a necessary element of a malicious prosecution claim is that the criminal proceeding must have terminated in favor of the accused; that is, the criminal prosecution must have ended in failure (*see Burt v. Smith*, 181 N.Y. 1 (1905), *appeal dismissed*, 203 U.S. 129 (1906); *Curiano v. Suozzi*, 63 N.Y.2d 113 (1984); *Heaney v. Purdy*, 29 N.Y.2d 157 (1971); *DiBlasio v. City of New York*, 102 F.2d 654 (2d Cir. 1996); *Cameron v. Fogarty*, 806 F.2d 380 (2d Cir. 1986); and *Broughton v. State of New York*, 37 N.Y.2d 451, *cert. denied*, 423 U.S. 929 (1975)).

The result reached in *Heck* does not, it is respectfully submitted, leave claimants like Leather without a federal forum for pursuing a Section 1983 claim. Just like the statute itself and many case law decisions have imposed necessary elements of the cause of action and conditions for bringing such lawsuits and defenses to the same, *Heck's* requirement for an overturning of the state court conviction before seeking a federal relief defines one element of a Section 1983 action where the claimant is or has been subjected to state criminal charges. Leather had the option to pursue in New York State courts the very same legal arguments used in his Section 1983 action. Leather could have used those arguments as a defense at the trial level, or could have used those arguments as grounds for an appeal. He apparently chose to do neither, and instead challenged his conviction by means of the Section 1983 lawsuit. The fact that Leather was never in custody, and therefore did not have a potential federal habeas remedy available to him, is not what should preclude his Section 1983 action; rather, his failure to seek any review of his conviction in our state courts is the critical element that should have required a dismissal of his federal lawsuit. Leather and other claimants like him should not be placed in a category who *cannot* challenge, though federal court remedies, a state court conviction. He should, we respectfully submit, be held to the *Heck* requirements because he *chose* to avoid a direct state review of his case, and instead attack it collaterally in the federal courts. This, we submit, is precisely the type of lawsuit that *Heck* ruled inappropriate and beyond even the broad reach of Section 1983.

The overturning of this Court's decision in *Heck*, which in effect has been accomplished by the Second Circuit in this case, creates a new and unfair source a liability for police and peace officers in particular, and for public servants in

general. Police and peace officers must make arrests and take other official actions in the daily performance of their duties. A difficult, but necessary consequence of these actions is the possibility of facing civil liability when their actions run afoul of state or federal law. The *amici* filing this brief certainly do not seek to limit legitimate federal review of these actions, by means of Section 1983 lawsuits. We do respectfully submit that actions deemed appropriate by state courts, whether expressly or by implication due to a criminal conviction in those courts, should not be subject to re-litigation and re-examination in a federal damages suit by way of a Section 1983 lawsuit. Defendants like Leather can, and most often do, allege factual questions which raise potential defenses to the charges pending brought against them. When those defenses, and the factual allegations which are the basis for the defenses, are defeated at a criminal trial, and a conviction is obtained, the officers involved should not be subject to facing these charges in a civil context, just because the convicted offender is no longer in custody or has finished his sentence. The basic principle behind *Heck*, before the speculation by some about what a new majority opinion authored by different Justices of this Court would be, remains sound and generally accepted law: by simply requiring that a civil plaintiff prove that his criminal conviction has been reversed or overturned, parallel litigation over the issues of probable cause and guilt will be properly avoided. Our federal courts should not recognize a Section 1983 claim unless and until the state court action has been invalidated. Certainly, this should apply to claimants, like Leather, who have every opportunity to raise these issues in state courts, including our states' appellate courts. A claimant's refusal or unwillingness to do so should not be the first step in the commencement of a federal Section 1983 action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER R. KEHOE
Counsel of Record
THOMAS MITCHELL
MCGOVERN, KEHOE AND MITCHELL
Attorneys for Amici Curiae
27 Elk Street
Albany, New York 12207
(518) 432-4318